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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1538

THE BANK OF CAMILLA,
Petitioner,

versus

THE COLUMBIAN PEANUT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

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Respondent, The Columbian Peanut Company, a Virginia corporation with offices in Pelham, Georgia, prays for the denial of the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 26, 1973 (rehearing denied on April 13, 1973).

JURISDICTION

The Respondent does not disagree with the Petitioner's citation of authority for invoking jurisdiction in the Supreme Court of the United States with regard to this matter; however, Respondent will strongly argue that though the Supreme Court would have juris-

diction to grant such a writ, this case is far from being appropriate for the granting of said writ.

STATEMENT OF THE CASE

A contract existed (Exhibit D-3) whereby the Pelham Peanut Company, Inc., by and through its president, Harry Frosteg, was to purchase and store for The Columbian Peanut Company, a Virginia corporation, peanuts bought from local farmers in the area of Pelham, Georgia. Pursuant to said contract, peanuts were purchased by the Pelham Peanut Company, Inc. for The Columbian Peanut Company during the 1970 peanut season from the local growers, and drafts on The Columbian Peanut Company were delivered to Harry Frosteg for payment to the individual growers. Harry Frosteg and the Pelham Peanut Company, Inc. were employed by The Columbian Peanut Company as buyers; the manner, method, means and quantity of the purchase of the peanuts were left to the sole discretion of the commission buyer (R. 413 — R. 415, Exhibit D-3).

An arrangement existed between The Columbian Peanut Company and The Bank of Camilla whereby said bank would handle The Columbian Peanut Company drafts for collection and then be reimbursed by The Columbian Peanut Company for all sums properly paid out. In addition, The Columbian Peanut Company paid one-eighth of one percent of the total amount of all sums collected through the bank as a transfer charge thereon. (Testimony of representative of Petitioner R. 346 — R. 347])

Thirty-seven of the checks (Exhibit P-1) issued to the respective growers totaling $53,624.10 were forged by Harry Frosteg and deposited into one of his accounts in the petitioner bank. Frosteg's covering check on his own account to each of the respective growers subsequently was returned for insufficient funds, and the farmers came to The Columbian Peanut Company for payment of the peanuts which they knew The Columbian Peanut Company held (Stipulation of Parties, R. 544 — R. 545).

Well within the one-year period which the Uniform Commercial Code and the corresponding Georgia law give for the discovery of forged endorsements, the forgeries of the endorsements were detected and reported to The Bank of Camilla (R. 417 — R. 418). The Columbian Peanut Company paid the respective farmers for their peanuts and in return received an assignment of any chose in action which any of the respective farmers might have against the petitioner bank or against Harry Frosteg or one of his companies. After refusal of The Columbian Peanut Company's demand for reimbursement from the petitioner bank, suit was instituted in the United States District Court for tht Middle District of Georgia, Albany Division, Case No. 1094. The action was filed December 28, 1970 (Complaints, R. 2 — R. 7). The jury returned a verdict in favor of The Columbian Peanut Company against The Bank of Camilla in the sum of $23,624.10. On motion of the bank, the District Court granted judgment N.O.V. and dismissed the claim of Columbian, but in the alternative granted a new trial for the bank. The Fifth Circuit Court of Appeals meeting in New Orleans

rendered the judgment as set forth in the appendix to Petitioner's brief to this Court, reversing the judgment of the District Court and remanding the case to be tried by a jury solely on the issue as to whether or not the bank wrongfully paid the checks over the forged endorsements of the commission buyer, Frosteg.

The Respondent now files this Brief in Opposition to Petitioner's Request for Writ of Certiorari to issue with regard to the review of this case.

ARGUMENT

The brief of the Petitioner in support of its petition for writ of certiorari has not stated the grounds upon which such a writ may be granted, nor has it raised arguments different from those already adequately briefed by both counsel and argued orally to the United States Court of Appeals for the Fifth Circuit meeting in New Orleans, October 18, 1972. Petitioner's brief attempts to reargue, point by point, matters previously dealt with in full by the Fifth Circuit Court of Appeals. The Respondent respectfully feels that such a reiteration of the arguments is not necessary to the determination of the appropriateness of the granting of the writ of certiorari now before this Court. The question is whether substantial error was committed by the Fifth Circuit Court of Appeals in ruling as it has, and in whether such an error, if one exists, has such far-reaching effect and has caused such confusion between the States as to necessitate the rearguing of this case and the settling of these questions by the Supreme

Court. The Respondent respectfully suggests that no such error and no such confusion exists. Consequently, the Respondent will reply only to the major elements of Petitioner's argument and will demonstrate to this honorable Court why the writ should not be granted.

The ruling issued by the Court of Appeals for the Fifth Circuit was in accordance with the accepted rules of banking procedures existing at the time and in the place this case arose. Said ruling has not created a situation which is in conflict with rulings in similar cases in other circuits of the United States.

Petitioner's entire case seems to be predicated on the suppostion that regardless of how the particular arrangement existing between The Columbian Peanut Company and The Bank of Camilla is defined, The Bank of Camilla owed to The Columbian Peanut Company (and vice versa) an obligation *less* than any bank would normally owe to any company or corporation with whom it had business dealings with regard to banking arrangements and procedures. The Respondent's position is that were this suppostion to be the accepted rule as Petitioner would have it, the orderly banking procedures now accepted in the United States would be seriously disrupted.

Petitioner points to the Uniform Commercial Code, § § 4-104(1)(a) [Ga. Code Ann. § 109A-4-104 (1)(a)]. This section says that "when used in this article on bank deposits and collections, unless the context otherwise requires, the word 'account' will mean any account with the bank and *includes* a checking, time, interest or savings account." (Emphasis added) Note

that it does not say that an account can be *only* one of the listed examples; it says rather that 'account' means *any account* with the bank and *includes* the listed examples.

The Court is respectfully directed to look further in the Uniform Commercial Code at § 4-104 (1)(e) [Ga. Code Ann. § 109A-4-104 (1)(e)] to the definition of the word "customer". "Customer means any person having an account with the bank or *for whom a bank has agreed to collect items* and includes a bank carrying an account with another bank." (Emphasis added) This relationship cannot be denied. It is a well accepted fact at this point that The Columbian Peanut Company had an arrangement with The Bank of Camilla whereby that bank would act as a collecting bank for drafts of The Columbian Peanut Company. At each day's end, the bank would forward to The Columbian Peanut Company all of the drafts which it collected on that particular day and would, in turn, be reimbursed by The Columbian Peanut Company by a draft on The First National Bank of Atlanta (R. 11 at paragraph 12; R. 20 at paragraphs 15, 16 and 17; and specifically R. 345, line 7 — R. 346, line 25 and R. 737, line 19 — R. 738, line 23).

In the Uniform Commercial Code's Article IV on bank deposits and collections, it speaks at § 4-102 of the applicability of this particular article and says specifically that "the liability of the bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is

governed by the law of the place where the bank is located." UCC § 4-102(2); Ga. Code Ann. § 109A-4-102 (2). It seems to clearly indicate that though it may be true that no specific checking, time, interest or savings account existed between the Petitioner and the Respondent, still there was a type of relationship for the handling of the items in collection between a bank on one side and the Respondent corporation on the other, which would be well within the scope of the Uniform Commercial Code's rules and responsibilities governing banks and their customers, and vice versa. Not only the law but also the logic of the situation dictates that this be the rule.

Whether the facts showed an actual account number existing for The Columbian Peanut Company or simply a relationship whereby Columbian paid The Bank of Camilla a fee for handling its drafts, the fact cannot be escaped that The Bank of Camilla and The Columbian Peanut Company were in a relationship which bore extremely similar characteristics to that of a depositor-bank/collection agent. At the very least, there was a relationship between a company (Columbian) and a bank (The Bank of Camilla) for the handling of negotiable paper. Such a relationship as this would obviously necessitate the type of conduct which would be expected in such a business encounter. A bank is being dealt with as a bank! It should be reasonably expected by the person or corporation dealing with that bank that banking procedures would be followed. On the other hand, the bank is having a business dealing with a company and it has the right to expect that company to deal with it in a fair and businesslike man-

ner. These facts make it imperative that the laws of the Uniform Commercial Code be implemented to cure any discrepancies or controversies arising between these parties. Even though there was no account number issued to Columbian, the fact remains that one dealing with a bank has a right to expect it to act in a reasonable "banking" manner. Whether or not money was actually on deposit does not really change the facts in this case. The judgment of the Court of Appeals for the Fifth Circuit has followed this line of thinking when it rejected the District Court's ruling that "the principle of law regarding the responsibility of a bank to its customer has no application here . . ." (R. 931) No situation has been created by the Fifth Circuit's rule that will disrupt the orderly banking procedures in the United States. On this ground, granting of the writ of certiorari is not called for.

The Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with other Courts of Appeal in this country, nor has it decided an important territorial question in a way in conflict with applicable state law. Rather, the Court of Appeals for the Fifth Circuit has ruled in accordance with the long established and necessary principles of law applicable within the State of Georgia and in all states where the Uniform Commercial Code governs banking transactions. The early Georgia case of *Atlanta Nat'l Bank v. Burke*, 81 Ga. 597, 7 S.E. 738 (1888), established the principle that "where one deposits money in a bank on general deposit, the bank immediately becomes the debtor of the depositor for the money deposited and undertakes, *impliedly*, to pay that money either to the

depositor or to some person to whom he directs it paid, and in order to discharge itself from this liability to the depositor, the bank must pay the money to the depositor or as directed by him. The liability cannot be discharged in any other way." *Atlanta Nat'l Bank v. Burke, supra.* (Emphasis added)

The principle is obviously the same whether the money is on deposit at the bank or the bank has made an arrangement with the customer whereby the customer will reimburse the bank for funds it pays out through properly discharged drafts of the customer. The rule has been modified slightly by Ga. Code Ann. § 109A-4-406, which puts a reasonable time limit on discovering forgeries or alterations, but the facts of this case are certainly within this limit.

The courts of this State have continued to follow the *Burke* case. See, e.g., *Ins. Co. of N. Am. v. Fourth Nat'l Bank*, 12 F.2d 100 (N.D. Ga. 1962), *aff'd* 28 F.2d 933 (5th Cir. 1928), *cert. den.* 279 U.S. 853 (1928); *Fulton Nat'l Bank v. Didschuneit*, 92 Ga. App. 527 (1955); *Citizens & S. Nat'l Bank v. New York Cas. Co.*, 84 Ga. App. 47 (1951). The depositor's duty of discovery has been spoken to by Georgia courts. "The duty imposed on a depositor to examine his passbooks, statements and returned checks does not extend to an examination of the signatures of the payees or of other endorsements on the returned checks [excepting, of course, Ga. Code Ann. § 109A-4-406, the law regarding the one year's time limit to discover such forgeries]; rather, it is the duty of the bank to determine the genuineness of such endorsements and to pay upon the

check at its peril; the depositor is not expected, nor is he required, to know whether or not such endorsements are genuine. *This rule is applicable even where an agent in the employ of the depositor has forged the payee's endorsement. First Nat'l Bank of Atlanta v. Am. Surety Co.*, 71 Ga. App. 112 (1944). (Emphasis added) A more recent case heard in Massachusetts has agreed that ordinarily the payor-depository bank will bear the loss, as between itself and its customers, when a payee's endorsement is discovered, timely, to be forged. *Stone and Webster's Engineering Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962).

The ALI-ABA Joint Committee on Continuing Legal Education agrees with and supports this rule with regard to a bank's responsibility toward the checks of its customers when it says, at Page 163 of its book on "Bank Deposits and Collections", that "it should be noted that the subsection (UCC § 4-406[1], Ga. Code Ann. § 109A-4-406[1]) does not require the customer to examine the endorsements of his cancelled checks; as under prior law, the customer is under no affirmative duty to make such an examination of the back of his checks, even when a customer would be in a position to know the signature of the endorser." The Court of Appeals for the Fifth Circuit has accepted this rule as the rule existing in the State of Georgia and throughout the Circuit. That Court says in its memorandum opinion, "of more importance, the consideration of policy which imposes a strict measure of responsibility upon a bank, arising out of the contract either of the drawee bank or of an intermediate bank,

would seem to apply also in favor of Columbian as the drawer of a check paid by a bank pursuant to a contract, even though the contract is not that of an original depositor. The bank's opportunity to determine whether an endorsement is genuine is usually better than the opportunity of the drawer of the check. The bank is also in a better position to protect itself by insurance. Under usual commercial practices, such policy considerations place a strict responsibility on a bank which contracts to cash a drawer's check." *Columbian Peanut Co. v. Harry Frosteg, et al.*, ____ S.E.2d ____ (5th Cir. 1973).

The Fifth Circuit Court of Appeals made the above-quoted statement in ruling that the District Court had erred when it stated that the principle of law governing the responsibilities of banks to their customers had no application in this case.

The Petitioner has argued that the Fifth Circuit Court of Appeals has misinterpreted and misapplied certain principles in the Uniform Commercial Code with regard to the reacquisition of negotiable instruments. Petitioner has urged that any liability that it might have had with regard to these forged endorsements has been discharged by the application of this particular section. The Respondent respectfully directs the attention of this Court to its lengthy step-by-step analysis of this Code section previously filed in its brief in support of its appeal to the United States Court of Appeals for the Fifth Circuit. In that brief it is tediously explained that this section refers to instruments which, as defined in the Uniform Commer-

cial Code, means negotiable instruments. It is further explained that because of the operation of the endorsement stamp that the petitioner bank placed on the back of these instruments, their negotiability had ended when put back into the hands of Respondent. Their coming back into the hands of The Columbian Peanut Company could not possibly have been reacquisitioned as that term is defined in Uniform Commercial Code § 3-208 (Ga. Code Ann. § 109A-3-208). This section simply has no applicability within the facts of the case at bar.

The Respondent, upon reviewing the opinion of the Fifth Circuit rendered in regard to this case, finds no fault whatsoever with that Court's summation of the facts and conclusions of law based on those facts as it saw them with regard to the case between The Columbian Peanut Company and The Bank of Camilla. (The Court is respectfully directed to the opinion itself, rather than to the Petitioner's quotation from said opinion in the appendix to The Bank of Camilla's petition for writ of certiorari, as some obviously inadvertent misquoting occurs in said appendix.) The opinion of the Fifth Circuit clearly points out that the rule which it is following is the rule not only in the State of Georgia, but also in the several states that have spoken to this question.

The Fifth Circuit has also ruled that Columbian's payment to the farmers for the peanuts which were in the possession of The Columbian Peanut Company was not a ratification of any fraudulent acts by any agent, but rather a recognition of a moral, if not legal,

responsibility to pay for items (i.e., peanuts) which were in fact in its possession. The Fifth Circuit has likewise correctly ruled that Frosteg was not acting within any possible scope of apparent or direct authority when he made purchases in the name of his own company, Pelham Peanut Company, and when he attempted to pay for said peanuts with his own check. All Columbian knew was that it had received the benefit of the peanuts which it thought had been bought for it with its own check. Columbian was liable to the growers since it had received the benefit of their peanuts. Therefore, "Columbian's subsequent payments for the peanuts did not, in our opinion, ratify the fraudulent acts of Frosteg but was simply a performance of its liability incurred before it had any knowledge of Frosteg's fraudulent acts." *Columbian Peanut Co. v. Harry Frosteg et al., supra* (1973).

CONCLUSION

In short, Petitioner has but reargued the factual matter of the case. Petitioner has not cited any conflicting Court of Appeals decisions which would create a situation needing settlement by the Supreme Court. Nor has Petitioner cited any serious conflict in this decision of the Fifth Circuit with the existing law of the State of Georgia in which this case arose. Nor has Petitioner pointed to the Court any cogent or compelling reason why this case is of such national importance as to require review by the Supreme Court of the United States. Rule 19 of the Supreme Court of the United States Revised Rules, adopted June 12, 1967, as amended to June 20, 1968, is specific in its requirements for

review by the Supreme Court and the granting of the writ of certiorari. The Petitioner has not demonstrated to the Court a case which comes under the specific considerations which govern the granting of the writ.

The ruling of the Fifth Circuit Court of Appeals has been in line with decisions of the State of Georgia and has been in line with the generally accepted principles between banks and individuals who deal with banks throughout the United States. This Court has ruled in *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955) that certiorari should not be granted except in cases which involve the settling of principles which are important to the public at large and in which there is a real and embarrassing conflict of opinion and authority between various Courts of Appeals. Rule 19 itself indicates that the granting of the writ of certiorari "is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Respondent respectfully suggests to the Court that the Petitioner has not demonstrated in any such questions any special or important reasons for the granting of the writ of certiorari in this case. The rule of the Fifth Circuit Court of Appeals as it applies to this case makes good common sense and is in fact the accepted standard now at work in the banking and business communities where this case arose and throughout the country. For these reasons the Respondent urges this Court to deny the granting of the writ of certiorari.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief has been served on the petitioner by forwarding a copy to the attorneys of record this ____ day of June, 1973.

ROBERT A. ELSNER